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No. 419

In the Supreme Court of the United States

OCTOBER TERM, 1957

EASTERN AIR LINES, INC., PETITIONER

v.

DERLYN E. MOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida (R. 53–58) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 38–48) is reported at 246 F. 2d 215.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1957 (Pet. App. 38). A petition for a writ of certiorari was filed on September 3, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether respondent held "a temporary position", as that phrase is used in the veterans' reemployment provisions of the Universal Military Training and Service Act, 50 U. S. C. 459, solely because he was a probationary employee.

2. Whether that Act entitles an honorably discharged veteran to count his time in the service as time on the job for the purpose of pay seniority.

3. Whether a veteran seeking to vindicate rights under that Act must exhaust his remedies before an Adjustment Board, established pursuant to the Railway Labor Act, prior to seeking judicial relief under the Training and Service Act.

STATUTE INVOLVED

Section 9 of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 50 U. S. C. App. 459, provides in relevant part as follows:

> (a) Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within

ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; * * * unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would

have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c) (1), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions, and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided,* That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against any person who may apply for such

benefits: *Provided further,* That only the employer shall be deemed a necessary party respondent to any such action.

* * * * *

STATEMENT

This action was instituted against Eastern Air Lines, Inc. by Derlyn E. Moe,[1] an honorably discharged veteran in the Air Lines' employ, to enforce re-employment rights under Section 9 of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 50 U. S. C. App. 459, *supra,* pp. 2–5. On cross-motions for summary judgment, the District Court denied the veteran's claim on two grounds: (1) as a probationary employee, Moe held a "temporary position" within the meaning of the Act and was therefore excluded from its coverage, and (2) the right to accrue seniority for pay purposes during military service was not conferred by the Act (R. 53–58). Because relief was denied, the District Court found it unnecessary to rule on Eastern's contention (R. 5) that Moe's suit was barred because of his failure to pursue his administrative remedy before the Eastern Air Lines Pilots' System Board of Adjustment.

The Court of Appeals for the Fifth Circuit reversed (Pet. App. 38–48). It held (1) that the specific jurisdictional grant of the Universal Military Training and Service Act did not require Moe first to seek relief before the Adjustment Board, (2) that as a probational employee Moe had a reasonable ex-

[1] The Department of Justice appears for respondent pursuant to 50 U. S. C. App. 459 (d), *supra,* p. 4. Under the same provision, petitioner was represented in both courts below by the Department of Justice.

pectation that his employment would be continuous and for the indefinite future, and therefore he held "other than a temporary position," and (3) that Moe was entitled to count his military service as time on the job for purposes of pay seniority.

The undisputed facts may be summarized as follows:

Respondent was employed by Eastern Air Lines as a co-pilot on August 4, 1950 (R. 34, 46). Seven months later, on March 1, 1951, he was called to active duty in the armed forces of the United States (R. 34, 46). When he returned, after receiving an honorable discharge (R. 34, 46), Eastern reemployed him, but refused to credit his time in the service as time on the job with respect to "seniority for pay purposes" (R. 34–35, 46). This resulted in Moe's receiving a lower wage rate than he would have received had he been continuously in his civilian employment.

The collective bargaining agreement between the Air Line Pilots Association, International, and Eastern Air Lines, which was in effect at the time Moe returned from the service, provided for a somewhat complicated wage system: Section 11 (a) provided for a monthly base pay for co-pilots which varied with the length of service with the Company (R. 20). The first year a co-pilot received $350 per month; the second year $400 per month (R. 20). The third year the base rate dropped to $250 per month and increased each year until, at the eighth year, the base rate reached $350 per month (R. 20). However, from the third to the eighth year, co-pilots were

paid, in addition to their base pay, an hourly wage rate. This additional hourly wage rate depended on the type of craft, the gross weight of the craft, the speed of the flight, the number of miles flown during the month, whether the flight required day or night flying, and the length of service of the co-pilot (R. 20–22). Finally, a minimum monthly guarantee was provided, which for the first two years was the base pay and thereafter increased yearly until the eighth year, when it was $565 a month (R. 22–23). Thus, a co-pilot was assured of a yearly wage increase for the first eight years of his service. The pay of first pilots was computed in a similar manner (R. 16–19) covering an eight-year period, so that a qualified employee beginning as a co-pilot could expect his earnings to increase gradually and substantially over a sixteen-year period if, after eight years, he were promoted to a first pilot. The contract referred to the length-of-service factor, as used for purposes of pay computation, as "seniority for pay purposes" (Section 11 (b); R. 20).

The contract further provided that, while "[a co-pilot's] seniority for pay purposes is to be computed on the actual length of service as a pilot with the Company" (R. 20), all non-probationary pilots and co-pilots[2] shall continue to accrue seniority for pay purposes during military service (R. 25). Under these provisions of the agreement, respondent was not entitled to accrue seniority for pay purposes because he

[2] Section 2 (a) of the agreement defines "pilot" to include co-pilot (R. 13).

had served only seven of a twelve-month probationary period when he was inducted. Section 21 of the Agreement provided that "[a] co-pilot shall be on probation for an aggregate of the first twelve months of his service on flying status as a copilot with the Company" (R. 24). On his return from military service, respondent completed his probationary period and became a regular co-pilot (R. 34, 46). He has been serving satisfactorily in this capacity ever since (R. 34, 46).

On January 18, 1956, Moe instituted this action pursuant to Section 9 of the Universal Military Training and Service Act to have his seniority for pay purposes computed as if he had been continuously in the employ of the Company and to recover the loss of salary resulting from Eastern's failure to do so (R. 2–4).

ARGUMENT

1. The veterans' reemployment provisions of Section 9 of the Universal Military Training and Service Act 62 Stat. 604, as amended, 50 U. S. C. App. 429, exclude from coverage those veterans who left "a temporary position", 50 U. S. C. App. 459 (b). Prior to the decision in the instant case, the Sixth and Seventh Circuits had held that probationary employees held temporary positions within the meaning of the Act and were therefore excluded from its coverage. *Venzel* v. *United States Steel Co.*, 209 F. 2d 185 (C. A. 6), certiorari denied, 348 U. S. 838; *Lesher* v. *P. R. Mallory & Co.*, 166 F. 2d 983 (C. A. 7). The decision in

the case at bar admittedly conflicts with these two decisions which we regard as erroneous.

The context in which *Venzel* and *Lesher* were argued and decided makes plain the reason for the error of those cases. In the early litigation construing the phrase "a temporary position", the question arose as to whether this exclusionary language was to be interpreted as applicable only to the position itself, or whether it also excluded from coverage an employee whose incumbency in a position was temporary even though the position itself was permanent. On the one hand, it was argued that the court's sole inquiry must be whether the position itself is temporary. On the other hand, it was said that a veteran who had held a position temporarily was excluded from the Act's coverage, even though the position he had occupied was itself permanent. See *e. g., Spearmon* v. *Thompson,* 167 F. 2d 626 (C. A. 8), certiorari denied, *sub nom. Delozier* v. *Thompson,* 335 U. S. 822, 886; *Doyle* v. *Division No. 1127,* 76 F. Supp. 655 (W. D. La.), affirmed on other grounds, 168 F. 2d 876 (C. A. 5). It was in this context that the question of whether a probationary employee held a "temporary position" was presented to the Sixth and Seventh Circuits in *Venzel* and *Lesher.* The veterans argued that, since the positions themselves were permanent, the occupants were necessarily covered. The courts refused to accept this contention and held that a temporary occupant of a permanent position is also excluded from cover-

age.[3] We do not contend here, nor did we contend below, that this reasoning of these earlier cases was erroneous. The Sixth and Seventh Circuits fell into error, however, because, having decided the main issue of whether a temporary occupant of a permanent position is outside the Act's coverage, they then automatically held a probationary employee to be temporary without considering the particular nature of his status.

The test for distinguishing between temporary and non-temporary occupants of a position has become

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[3] The court said in the *Venzel* case:

> We agree with the view expressed by the District Judge * * * that in determining whether or not the appellant left a position other than a temporary position when he was inducted into service, we must consider the status of the particular employee in the position which he then occupied rather than the permanency of the job which may at times be filled by either a permanent or a temporary employee * * *. [209 F. 2d at 186].

In the *Lesher* case, the court stated the question as follows:

> As to the meaning to be attributed to "a position other than a temporary position," plaintiffs contend, as we understand, that the controlling words of this phrase are "a position," and that if the position is permanent it is immaterial as to the relation which the employee sustains thereto. In other words, if a position is permanent, the employment is not temporary, regardless of its character. On the other hand, it is the defendant's contention that the controlling factor is the employment relationship, even though the position itself may be permanent.
>
> Plaintiffs are not only confronted with the findings made by the court below but cite no authority which supports their contentions. In fact, the weight of authority, although not too decisive, points in the opposite direction. [166 F. 2d at 985].

well-established. The question is whether the employee has a reasonable expectation that his employment will be continuous and for the indefinite future. The leading case is *Trusteed Funds* v. *Dacey*, 160 F. 2d 413, 419 (C. A. 1):

> * * * It must have been contemplated that their employment with the company would be continuous, for the indefinite future, and that their respective contracts would be renegotiated and renewed from time to time as a matter of course * * *. The positions were expected to be continuous ones, provided the relationship proved to be mutually satisfactory. This is none the less true because of the fact that the company (Sec. 8 apart)[4] could terminate the employment by refusing to renew the contract upon its expiration. The same may be said of an ordinary workman employed at will. It may be apparent from the circumstances attending the creation of the employment that the position was expected to be continuous, for the indefinite future, and notwithstanding the right of the employer to terminate the employment at any time such position is one "other than a temporary position" within the meaning of Section 8. In either case, the effect of Section 8, enacted by Congress under its broad war powers, is to impose upon the employer an obligation he had not contracted to assume—an obligation to reemploy the veteran, and not to discharge him without cause within one year after such restoration. In either case the veteran may need the statutory protection. The

[4] Now Section 9, 50 U. S. C. App. 459.

> two cases present no difference in principle. * * *.[5]

If the Sixth and Seventh Circuits had directly considered whether a probationary employee was in fact a temporary occupant of the position, it is probable that those courts, too, would have concluded that, where a probationary employee has a reasonable expectation of continuous employment for the indefinite future, he is not "temporary" within the meaning of the Act.

In respondent's case, it is clear that he had a reasonable expectation that his employment would be continuous and for the indefinite future, as indeed it turned out to be. The only distinction which the Agreement makes between a probationary and a non-probationary co-pilot (other than the right to accrue seniority for pay purposes during military service, a provision which was declared invalid by the court below) is that a probationary co-pilot is not extended the right of investigation and hearing, *i. e.,* is not entitled to use the grievance procedure (Section 29 (c) (2); R. 27). In effect, the employment relationship during the probationary period is an employment at will, or so long as it is mutually agreeable to both parties, but it is clear that an employment at will is not a "temporary" one. *Trusteed Funds* v. *Dacey,*

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[5] The following cases have also applied this "reasonable expectation of continuous employment" test: *Salzman* v. *London Coat of Boston, Inc.*, 156 F. 2d 538 (C. A. 1), certiorari denied, 329 U. S. 806, *Bryan* v. *Griffin*, 166 F. 2d 748 (C. A. 6); *Houghton* v. *Texas State Life Insurance Co.*, 166 F. 2d 848 (C. A. 5); *United States ex rel. Stanley* v. *Wimbish*, 154 F. 2d 773 (C. A. 4).

supra; Bryan v. *Griffin, supra; Daniels* v. *Barfield,* 71 F. Supp. 884 (E. D. Pa.).

2. Petitioner next argues that the right to accrue seniority for pay purposes during military service is not covered by the Act. Its argument rests on two legs: first, that the collective bargaining agreement provides that a probationary co-pilot will not accrue seniority for pay purposes during his military service; and, second, that the wage increases based on pay seniority are in effect given for the increased proficiency that comes with experience and are therefore not covered by the Act.

(*a*) Petitioner's first argument contravenes the principle, well established since *Fishgold* v. *Sullivan Drydock & Repair Corporation,* 328 U. S. 275, that "* * * no * * * agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act" (328 U. S. at 285), and also ignores the dispositive holding in *Diehl* v. *Lehigh Valley R. Co.,* 348 U. S. 960, declaring invalid (as to a veteran) a collective bargaining provision which required, as does the instant contract, actual time on the job before the accrual of seniority.[6]

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[6] *Diehl* rested on the "continuous employment" test, which received statutory endorsement in Section 9 (c) (2) of the Act, 50 U. S. C. App. 459 (c) (2):

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

Petitioner's attempt to limit *Diehl* to its own facts (Pet. 27–29) is similar to the arguments presented by the respondent in *McKinney* v. *Missouri-Kansas-Texas Railroad Co.*, pending on a writ of certiorari to the Court of Appeals for the Tenth Circuit, No. 93, this Term. The major distinction petitioner offers is that *Diehl* dealt with seniority *other* than for pay purposes. But it is significant that neither the opinion of the Court of Appeals in that case, (211 F. 2d 95 (C. A. 3)) nor the *per curiam* opinion in this Court reveals the particular nature of the right or rights that were to accrue to the employee by virtue of his seniority; this clearly indicates that, regardless of what particular right accrues by virtue of seniority, the holding was that a veteran's service-time is to be counted as time-on-the-job so long as the right accrues merely from the passage of time. Section 9 (c) (2) of the Act, 50 U. S. C. App. 459 (c) (2) footnote 6, *supra*, p. 13. There is no sound reason for distinguishing among the many rights which accrue under an employee's seniority.

(*b*) But the petitioner also argues that because seniority for pay purposes accrues, under Eastern's collective bargaining agreement, only with actual time-on-the-job (with the significant exception of non-probationary pilots and co-pilots on military leave), these increases are awarded not merely by virtue of the passage of time, but rather because of the increased proficiency and skill coming from actual experience. The Court of Appeals recognized below that, under the Act, military service is not a substitute for proficiency (Pet. App. 46). But it also

recognized that there is an element of experience, and therefore proficiency, in every system of seniority, and that the accrual of seniority in the instant case was not peculiarly related to experience[7] (Pet. App. 46). That this is so is shown by the provision that all non-probationary pilots and co-pilots continue to accrue seniority for pay purposes *during their military service* regardless of whether or not their military duties are at all related to their work on the airline. Moreover, flying experience with another company is not credited to a new employee, as would be the case if the wage increases were awarded for the increased proficiency coming from experience. Also, the seniority wage increases are entirely and completely automatic without discretion in any one to grant or withhold them. In short, a realistic examination of these step-rate increases shows that they are awarded to assure the employer of a relatively stable and satisfied labor force by insuring the satisfactory employee of normal economic progress. In these circumstances, the Act does not permit the veteran's normal up-grading to be retarded by artificially characterizing these increases as awarded for increased proficiency.

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[7] The Court of Appeals noted that on occasion the passage of time may be used as a measure of proficiency, and in such a case, military service does not count as time on the job. For example, military service has been held not to count toward the fulfillment of an apprenticeship requirement, since the apprenticeship period is required to insure that certain skills will be acquired before the apprentice is made a full-fledged member of the craft; entrance to the craft is not based on mere passage of time. *Poore* v. *Louisville and Nashville Railroad Co.*, 235 F. 2d 687 (C. A. 5).

3. The petitioner's remaining argument—that the employee cannot take his case to court until he has first presented his claim to an Adjustment Board established under the Railway Labor Act, 45 U. S. C. 184—may be dealt with shortly. Section 9 (d) of the Universal Military Training and Service Act specifically confers jurisdiction on the district courts "[i]n case any private employer" fails to comply with the re-employment provisions of the Act. There is no indication that Congress intended to distinguish between veterans seeking re-employment rights against carriers governed by the Railway Labor Act and veterans seeking re-employment rights in other industries. In *McKinney* v. *Missouri-Kansas-Texas Railroad Co.*, 240 F. 2d 8, 10–11, pending on writ of certiorari, No. 93, this Term, the Tenth Circuit declared:

> * * * The mandate of the statute is clear and it does not condition the right to institute and maintain such an action upon prior exhaustion of the administrative procedure under the Railway Labor Act. Inasmuch as this type of labor dispute is peculiar to veterans and the statute specifically applies to veterans as a class, prior exhaustion of administrative procedures under the Railway Labor Act is unnecessary. * * *

In addition to the explicit rejection of petitioner's argument by the Fifth Circuit below and by the Tenth Circuit, the same contention has been impliedly rejected by this Court and by at least six other courts of appeals which have entertained suits against carriers without requiring the veteran to exhaust his administrative remedies under the Railway Labor Act. *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 378; *Diehl* v.

Lehigh Valley R. Co., 348 U. S. 960; *Diehl* v. *Lehigh Valley R. Co.*, 211 F. 2d 95 (C. A. 3), reversed, *supra*; *Bostian* v. *Seaboard Air Line R. Co.*, 211 F. 2d 867 (C. A. 4); *Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856 (C. A. 6), certiorari denied, 343 U. S. 903; *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967; *Spearmon* v. *Thompson*, 167 F. 2d 626 (C. A. 8), certiorari denied, *sub nom. Delozier* v. *Thompson*, 335 U. S. 822, 886; *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C. A. D. C.).

CONCLUSION

As indicated above, we believe the decision below to be clearly correct. However, we recognize that in view of the apparent conflict of circuits on the first issue discussed above (*supra*, pp. 8–13), and the similarity of the second and third issues (*supra*, pp. 13–17) to those presented by the *McKinney* case, No. 93, the Court may wish to grant the writ or to withhold action on this petition until the disposition of *McKinney*.

Respectfully submitted.

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